

GAHC020000782017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/258/2017

BESA
RESIDENT OF SONG SONG VILLAGE, MAO,
DISTRICT-SENAPATI, MANIPUR

VERSUS

STATE OF NAGALAND AND 4 ORS.
REPRESENTED BY THE CHIEF SECRETARY,
GOVERNMENT OF NAGALAND, KOHIMA

2:THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF NAGALAND DEPARTMENT OF HEALTH AND
FAMILY WELFARE NAGALAND KOHIMA

3:THE PRINCIPAL DIRECTOR DEPARTMENT OF HEALTH AND
FAMILY WELFARE NAGALAND KOHIMA.

4:THE MEDICAL SUPERINTENDENT T.B. HOSPITAL KHUZAMA
KOHIMA

5:PUNI ATHIA DARK ROOM ASSISTANT
C/O THE MEDICAL SUPERINTENDENT T.B HOSPITAL KHUZAMA
KOHIMA NAGALAND

Advocate for the Petitioner : YANGER WATI

Advocate for the Respondent : GOVT ADV NL

**BEFORE
HON'BLE MR. JUSTICE KAKHETO SEMA**

JUDGMENT & ORDER (CAV)

Date : 19-10-2023

Heard Ms. Asi Kire, learned counsel for the petitioner, Mr. N. Angami, learned Sr. Government Advocate for the State respondents No. 1 to 4 and Mr. Limawapang, learned counsel for the respondent No. 5.

2. The present writ petition has been filed seeking for a direction to quash and set aside the order dated 17/02/2016 passed by the Principal Director, Directorate of Health & Family Welfare, Nagaland, Kohima, appointing the respondent No. 5 to the post of Dark Room Assistant under the establishment of the Medical Superintendent, T B and Chest Diseases Hospital, Khuzama and to direct the State respondents to fill up the post from amongst the landowners.

3. The case in brief is that, by an advertisement dated 31/05/2013, issued by the Directorate of Health & Family Welfare, Nagaland, Kohima, applications were invited from amongst the landowners of the district Chest & T B, hospital, Khuzama for filling up one post each of Dark Room Assistant and Medical Attendant. The petitioner applied for the post of the Dark Room Assistant and qualified the selection process. Accordingly, by the order dated 26/08/2013 issued by the Principal Director, Health & Family Welfare, Nagaland, Kohima, the petitioner was appointed to the post of Dark Room Assistant at T B & Chest Diseases Hospital, Khuzama. The respondent No.5 however did not qualify for the post of the Medical Attendant. Subsequent to the appointment of the petitioner, Smti. Helena, the mother of the respondent No.5 filed a complaint to the Principal Director, Health & Family Welfare, Nagaland, Kohima, alleging fraud and impersonation in the recruitment to the post of the Dark Room Assistant. Against the complaint, the Song Song Village Authority, Mao, Senapati District, Manipur, one of the village which had donated land for the establishment of the hospital, submitted the letter dated 11/11/2013 to the department stating therein that as the respondent No.5 is married to a person from another village i.e. Makhel village, the respondent No.5 is no longer eligible to be appointed on landownership

basis and therefore requested the authority to reject the complaint filed by the mother of the respondent No.5 and to continue with the appointment of the petitioner. The said village also on 23/11/2013 adopted the resolution to appoint the petitioner to the post of Dark Room Assistant and communicated the same to the department.

4. The department accordingly summoned the petitioner, the respondent No.5 and others for resolving the issue. However, as the petitioner did not respond to the notice despite receiving the same, the petitioner was terminated from her service. The department thereafter, issued the order dated 03/03/2014 appointing the respondent No.5 to the post of Dark Room Assistant at District T.B & Chest Diseases Hospital, Khuzama.

5. Against the appointment of the respondent No.5, the petitioner filed W.P.(C) No. 43(K) of 2014 which was disposed of by this Hon'ble Court by the judgment & order dated 29/07/2015. Paragraph-8, 9 & 10 of the said judgment is reproduced below;

“8. This Court has also considered the complaint made by the mother of the private respondent to the respondent No. 3 as well as the communication made by the Song Song Village Authority with regard to the complaint made by the mother of the private respondent. It is also noticed that on the basis of the complaint, the official respondents had issued three circulars on three different dates directing the petitioner, the private respondent and others to appear before them for clarification. The Peon Book which has been annexed in the affidavit-in-opposition as Annexure B and B1 filed by the State respondents has also been considered by this Court. From the Peon Book it can be seen that the petitioner has received the said circulars however the petitioner chose not to appear before the concerned authority. When the petitioner has not appeared before the concerned authority to clarify her position, this Court cannot find fault on the part of the official respondents to have issued the notice dated 30-02-2014 cancelling the appointment of the petitioner as Dark Room Assistant within one month from the date of issue of the notice.

9. However, the respondents could not have appointed the private respondents to the post of Dark Room Assistant when she had never applied for the post of Dark Room Assistant pursuant to the advertisement dated 31-05-2013. Therefore there was absolutely no basis on the part of the Official respondents to have appointed the

private respondents to the said Post.

It is also pertinent to note that advertisement dated 31-05-2013 was issued on the basis of the directions passed by this Court in W.P (C) No. 207 (K) of 2009 and W.P (C) No. 219 (K) of 2009. Therefore, after the termination of the petitioner, it was incumbent on the part of the respondents to have issued a fresh advertisement for the said post of Dark Room Assistant. In that view of the matter, the impugned order dated 03-03-2014 appointing the private respondent to the post of Dark Room Assistant under the establishment of Medical Superintendent, District Chest & T.B. Hospital, Khuzama is set aside and quashed.

10. *The respondents are now directed to issue advertisement for filling up of the post of Dark Room Assistant under the establishment of Medical Superintendent, District Chest & T.B. Hospital, Khuzama and thereafter make appointment to the said post from amongst the eligible landowners. Needless to say that the petitioner as well as the private respondent shall be at liberty to apply for the said post, if they so desire, Let such advertisement and selection process be completed within a period of 3 (three) months from the date of receipt of a copy of the order of this Court by the respondent No. 3 i.e Principal Director, Department of Health & Family Welfare, Nagaland, Kohima."*

6. Consequent to the passing of the judgment & order dated 29/07/2015, the Directorate of Health & Family Welfare, Nagaland, Kohima, issued the advertisement dated 04/11/2015 inviting applications from amongst the eligible landowners for filling up the post of Dark Room Assistant at T B & Chest Hospital, Khuzama. Both the petitioner and the respondent No.5 applied for the post. By the order dated 12/11/2015, issued by the Principal Director, Health & Family Welfare, Nagaland, Kohima, a Committee was also constituted to conduct the interview for the post of Dark Room Assistant. The Committee after verification of the documents submitted by the petitioner and the respondent No.5 conducted the interview on 13/11/2015 at the IBSP Conference Hall. In the interview, the petitioner secured 29 marks while the respondent No. 5 secured 39 marks.

7. However, after the declaration of the result, the Song Song Village Authority wrote the letter dated 16/11/2015 to the Principal Director, Health & Family Welfare, Nagaland, Kohima, recommending the appointment of the petitioner to the post of Dark Room Assistant by conveying that Mr. S. Puni, the father of the respondent No.5

has been excommunicated from the village for 7(seven) years by a resolution adopted by the village on 18/10/2014. In the meantime, the respondent No.5 also submitted the letter dated 27/01/2016 to the Principal Director, Health & Family Welfare, Nagaland, Kohima, for withdrawing the land ownership and the No-objection certificates issued to her by the village which was submitted by the respondent No.5 while applying for the post, by stating that as the certificates were issued to her prior to her marriage with a person from another village she is no longer eligible to claim such benefits.

8. The Principal Director, Health & Family Welfare, Nagaland, Kohima, in the meanwhile, issued the order dated 17/02/2016 appointing the respondent No.5, on merit, to the post of Dark Room Assistant at T B & Chest Diseases Hospital, Khuzama. The order was issued pursuant to the Government letter No. HFW(A)/Court/2/2014/210 dated 17/02/2016.

9. Consequent to the appointment of the respondent No.5, the Song Song Village submitted the application dated 05/03/2016 to the department expressing resentment against the appointment and also conveying that the certificates submitted by the respondent No.5 which was subsequently withdrawn was found to be forged. The village also submitted the representation dated 20/04/2016 to the Hon'ble Minister, Health, Nagaland, to revoke the appointment of the respondent No.5 citing that as the village did not issue the NOC/Land ownership certificates to anyone except the petitioner, the certificates submitted by the respondent No.5 are fake. The Hon'ble Minister on receipt of the representation directed the Principal Director, Health & Family Welfare to carefully examine the matter for necessary action.

10. Consequent to the complaint lodged by the village, the Principal Director, Health & Family Welfare, Nagaland, Kohima, wrote the letter dated 08/06/2016 to the Commissioner & Secretary, Health & Family Welfare Department, conveying the objection raised by the village and for necessary action. In response, the Government of Nagaland in the Health & Family Welfare Department wrote the letter dated 21/07/2016 to the Director & HOD, Health & Family Welfare department citing the observation made by the Law Department and conveying that as the appointment of

the respondent No.5 was made in compliance to the order dated 29/07/2015 passed by the High Court, the appointment, cannot be disturbed till such time, the order dated 29/07/2015 is reversed.

11. Being aggrieved by the inaction of the State respondents to cancel the appointment of the respondent No.5, the present petition has been filed.

12. Ms. Asi Kire, the learned counsel for the petitioner attacks the appointment of the respondent No.5 solely on the ground that the respondent No.5 is not a land owner and therefore, not eligible to be appointed to the post. Ms. Kire has taken this Court to the advertisement dated 04/11/2015 to submit that it is only the land owners who are eligible to be appointed to the post of Dark Room Assistant and the respondent No.5 not being a land owner could not have been appointed to the post. Ms. Kire has also referred to the judgment & order dated 29/07/2015 in which the Court had directed the State respondents to issue the advertisement for filling up the post of Dark Room Assistant and to make appointment from amongst the eligible land owners. Ms. Kire further submits that though the respondent No.5 originally hailed from Song Song Village since the respondent No. 5 has married a man from another village she can no longer claim to be a member of the village and claim the benefits of appointment on land ownership basis. The learned counsel for the petitioner further relying on the letters/representations written by the Song Song Village to the respondents authorities submits that the certificates furnished by the respondent No.5 while applying for the post were not issued by the concerned village authority and therefore fake. The learned counsel accordingly submits that the respondent No.5 not being a land owner nor a resident of Song Song Village, is eligible to be appointed to the post of Dark Room Assistant.

13. Mr. Limawapang, the learned counsel for the respondent No. 5, at the outset refers to the judgment & order dated 29/07/2015 passed by this Court and submits that, the Hon'ble Court while directing the State respondents to advertised the post of Dark Room Assistant and make appointment from amongst the land owners had also given the liberty to both the petitioners and the respondent No.5 to apply for the post. The respondent No.5 being eligible had accordingly applied for the post and having

qualified in the interview conducted on 13/11/2015 was appointed to the post on merit by the department by issuing the order dated 17/02/2016. Mr. Limawapang submits that it is only after the interview and the appointment of the respondent No.5 that the Song Song Village Authority has raised objection against the appointment of the respondent No.5 by taking up the cause of the petitioner. Mr. Limawapang further submits that, the portion of the land which was donated by Song Song Village for the establishment of T B & Chest Hospital, Khuzama belongs to the Song Song Village as a whole and not to any particular individuals and, that being so, the land ownership certificate was issued to both the petitioner and the respondent No.5 by the village making them eligible to apply for the post on land ownership basis.

14. Mr. Limawapang by further reading paragraph-7 of the affidavit filed by the respondent No.5 submits that the respondent No.5 had divorced from her husband in the year 2013 and has since then been leaving with her parent. Mr. Limawapang has also taken this Court to the certificate dated 02/02/2018 issued by the Chairman, Song Song Village Authority wherein it has been stated that the respondent No.5 is a genuine villager/citizen of Song Song Village and one of the land donors of T B Hospital Khuzama. The certificate also mentioned that every genuine individual/family of Song Song Village collectively owns the land of T B Hospital Khuzama. Mr. Limawapang by further taking this Court to the letter dated 02/06/2017 (Annexure-H to the affidavit of the respondent No.5) written by the respondent No.5 to the Principal Secretary, Health & Family Welfare department and the declaration dated 02/06/2017 (Annexure-G to the affidavit of the respondent No.5) made by the respondent No.5 before the Chief Judicial Magistrate, Kohima submits that the letter dated 27/01/2016 (Annexure-K to the writ petition) written by the respondent No.5 to the department withdrawing the certificates was made under duress because of the threat made by the Officer-in-Charge, Mao Police Station and the Ex-chairman Song Song Village. Mr. Limawapang accordingly submits that the complaint(s) and the representation(s) submitted by the village to the department against the appointment of the respondent No. 5 were all made at the behest of the petitioner to deny the appointment to the respondent No.5 and having failed in the attempt to oust the petitioner from service,

the present petition was filed.

15. Mr. N. Angami, the learned Sr. Government Advocate subscribing to the submission made by the learned counsel for the respondent No.5, submits that consequent to the judgment & order dated 29/07/2015 passed by this Court, the post of Dark Room Assistant was advertised by the department in which both the petitioner and the respondent No.5 appeared the interview for the post. The respondent No.5 being successful was appointed to the post by the department by issuing the order dated 17/02/2016. Mr. N. Angami submits that when the respondent No.5 applied for the post and appeared for the interview along with the petitioner, the petitioner at no point of time raised objection to the candidature of the respondent No.5. It was only after the respondent No.5 qualified the interview and was appointed to the post that the petitioner after having failed in her attempt to oust the petitioner from service, filed the present writ petition challenging the appointment of the respondent No.5 to the post. Mr. N. Angami submits that since the present case is one where the petitioner is challenging the appointment of the respondent No.5 after having failed to qualify the interview, the writ petition deserves to be out rightly rejected.

16. Heard the learned counsel for the parties and perused the pleadings. This Court while disposing W.P.(C) No. 43(K)/2014 had by the judgment & order dated 27/09/2015 directed the State respondents to issue advertisement for filling up the post of Dark Room Assistant under the establishment of the Medical Superintendent, District Chest & T B Hospital Khuzama and to make the appointment from amongst the eligible land owners. By the said order liberty was also given to both the petitioner and the respondent No.5 to apply for the post, if they so desired. Consequent to the direction issued by this Court, the department issued the advertisement dated 04/11/2015. Both the petitioner and the respondent No.5 being qualified and eligible applied for the post and appeared the interview which was conducted on 13/11/2015. In the interview, the respondent No.5 secured 39 marks while the petitioner secured 29 marks. The department accordingly issued the order dated 17/02/2016 appointing the respondent No.5, on merit, to the post of Dark Room Assistant at T.B & Chest Hospital Khuzama. Subsequent to the appointment of the respondent No.5, the Song

Song Village submitted complaint/representation to the department expressing resentment and urging the department to revoke the appointment of the respondent No.5 and to appoint the petitioner on the ground that the respondent No.5 is not a land owner. It is however observed, that the petitioner, right from the time the applications for the post were invited till the declaration of the result and the consequent appointment of the respondent No.5 and even thereafter has not raised any objection against the candidature of the respondent No.5 nor against her appointment and it is only after the complaint/representation submitted by the village failed to evoke any response from the Government/department, the petitioner filed the present petition impugning the appointment of the respondent No.5. Curiously, however in the writ petition the only relief sought for is to quash the order appointing the respondent No.5 and direct the State respondents to appoint the land owner to the post without seeking any relief as regard the candidature of the petitioner and her entitlement to the post.

17. It is a well settled law that if a person takes a calculated chance and appears at the interview, then only because the result of the interview is not palatable to him/her, he or she cannot turn around and challenge the selection/appointment of the successful candidate and/or contend that the process of the interview or the methodology adopted was unfair. In the present case, it is not the case of the petitioner that the respondent No.5 was appointed through unfair means or that the selection process was unfair. It is also seen that the interview for the post was conducted on 13/11/2015 and the result of the interview was declared on the same date and the order appointing the respondent No.5 was issued by the department on 17/02/2016. However, it is only on 06/11/2017 that the present writ petition was filed. It is therefore very obvious that the petitioner was taking a calculated chance and observing as to whether the action taken by the village against the appointment of the respondent No.5 would work out to her advantage and it is only when all such attempts failed, the present writ petition was filed.

In the case of the **Madras Institute of Development Studies & Another** -versus- **K. Sivasubarmaniyan & Others**, reported in (2016) 1 SCC 454, the

Hon'ble Supreme Court held thus;

“13. Be that as it may, the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, submitted his application and participated in the selection process by appearing before the Committee of experts. It was only after he was not selected for appointment that he turned around and challenged the very selection process. Curiously enough, in the writ petition the only relief sought for is to quash the order of appointment without seeking any relief as regards his candidature and entitlement to the said post.

16. In [Madan Lal vs. State of J&K](#)⁵, similar view has been reiterated by the Bench which held that: (SCC p. 493, para 9)

“9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus, the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In [Om Prakash Shukla v. Akhilesh Kumar Shukla](#)⁶ it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.”

17. In [Manish Kumar Shahi vs. State of Bihar](#)⁷, this Court reiterated the principle laid down in the earlier judgments and observed: SCC p. 584, para 16)

“16. We also agree with the High Court⁸ that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not

entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

In the case of **Ashok Kumar & Another -versus- State of Bihar & Others**, reported in **(2017) 4 SCC 357**, the Hon'ble Supreme Court held that;

"13. The law on the subject has been crystallised in several decisions of this Court. In Chandra Prakash Tiwari v. Shahkuntala Shukla⁶, this court laid down the principle that when a candidate appears at an examination without objection and is subsequently found not to be successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was lacuna therein, merely because the result is not palatable. In Union of India v. Vinodh Kuma⁷, this Court held that: (SCC p.107, para 18)

"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See Munindra Kumar v. Rajiv Govil⁸ and Rashmi Mishra v. M.P. Public Service Commission⁹.)"

17. In Ramesh Chandra Shah v. Anil Joshi¹⁵, candidates who were competing for the post of Physiotherapist in the State of Uttarakhand participated in the written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p.318, para 18)

"18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."

18. In Chandigarh Admn. v. Jasmine Kaur¹⁶, it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to

the selection process cannot turn around and complaint that the process of selection was unfair after knowing of his or her non-selection. In Pradeep Kumar Rai V. Dinesh Kumar Pandey¹⁷, this Court held that: (SCC p.500, para 17)

“17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted.”

This principle has been reiterated in a recent judgment in Madras Institute of Development Studies v. K.Sivasubramaniyan¹⁸.”

18. On the issue of land ownership, this Court has seen the certificate issued by the Song Song Village Authority way back in the year 2013, certifying that the respondent No 5 is a donor of the land where the District Chest & T B Hospital Khuzama is established. The village has also issued the No Objection Certificate dated 09/06/2013 stating therein that the village authority has no objection with the appointment of the respondent No.5 to the post of Dark Room Assistant at District Chest & T B Hospital Khuzama. Surprisingly, it is only after the selection and the appointment of the respondent No.5, that the village is agitating against the appointment of the respondent No.5 by raising an issue that as the respondent No.5 is married to a person from another village, she is no longer a member of the village and therefore not a land owner. The respondent No. 5 in her affidavit has however stated that she divorced from her husband in the year 2013 and has since then been leaving with her parents. No affidavit has filed by the petitioner to rebut the statement made by the respondent No.5. It is also interesting to note that the Song Song Village Authority has on 02/02/2018 again issued the certificate, stating that the respondent No.5 is a bonafide citizen of the village and is one of the land donors of the T B Hospital Khuzama. This certificate further states that every individual/family of the village

collectively owns the land where the T B Hospital is established, meaning thereby that it is the village and not any individual villager who owns the land. From the certificates issued by the village authorities to the respondent No. 5 and on perusal of the documents annexed to the pleadings of the parties, this Court has no hesitation in arriving at a finding that the Song Song Village is one of the donors of the land on which the T B & Chest Diseases Hospital is established. The respondent No.5 being a native and a bonafide member/resident of Song Song Village cannot therefore be debarred from being appointed to the post on land ownership basis nor this Court finds any legal infirmity to disapprove the appointment of the respondent No.5 to the post in question.

19. In the light of the discussion made above, this Court is of the view that there is no merit in the petition and the same is liable to be dismissed.

20. Writ petition accordingly stands dismissed. No cost.

JUDGE

Comparing Assistant